

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANCES PAGAN-AFANADOR	:	CIVIL ACTION
d/b/o VICTOR PAGAN-AFANADOR,	:	
deceased	:	
	:	
v.	:	
	:	
JO ANNE B. BARNHART, COMMISSIONER	:	
OF SOCIAL SECURITY ¹	:	No. 99-CV-3560

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

May 21, 2002

Frances Pagan-Afanador ("Pagan-Afanador"), on behalf of her deceased husband, challenges the denial of supplemental security income benefits ("SSI") under the Social Security Act. Cross-motions for summary judgment were referred to Magistrate Judge Arnold C. Rapoport for a Report and Recommendation ("R&R"). Magistrate Judge Rapoport recommended that plaintiff's motion for summary judgment be denied and defendant's motion for summary judgment be granted. Objections were filed. On de novo consideration, the R&R will not be approved; plaintiff's motion for summary judgment will be granted and the action remanded to the Commissioner for calculation of benefits.

I. Procedural History

¹Jo Anne B. Barnhart is substituted for her predecessors, Kenneth S. Apfel (Commissioner) and Larry G. Massanari (Acting Commissioner), as Commissioner of the Social Security Administration. Fed. R. Civ. P. 25(d)(1).

Victor Pagan-Afanador filed protectively for SSI in 1995, and was denied benefits. A hearing before Administrative Law Judge Hazel C. Strauss ("the ALJ"), in 1997, resulted in an unfavorable determination. The Appeals Council summarily denied the request for review, and is the final decision of the Commissioner.

Plaintiff, filing this action in 1999, contested the Commissioner's determination. Following conclusion of briefing on plaintiff's objections to Magistrate Judge Rapaport's R&R, and while this matter was sub judice, Victor Pagan-Afanador died. Although Frances Pagan-Afanador was substituted, for convenience and readability this memorandum refers to the plaintiff as masculine.

II. Facts Relevant to the Commissioner's Determination²

Plaintiff was born on February 5, 1954. He graduated from tenth grade, in a special education program, and later completed a five month special vocational course.

Plaintiff's employment history consisted of intermittent work in short term jobs: cleaner; newspaper stuffer; and

²Plaintiff does not object to the R&R's treatment of his claims for physical disability. The R&R's conclusion about plaintiff's physical disability will be adopted: "there is no evidence that the plaintiff was treated for knee pain or any other impairment during the period of time relevant to this application"

mechanic's helper. Plaintiff's only semi-permanent employment was a six-month position as a "driver's helper;" plaintiff "rode around with a guy in a truck" and "made phone calls if something happened to the truck." The position of "driver's helper" was created as a "favor ... because [plaintiff's] brother worked for" the employer. R. 48-49, 51. It was part time (two to four days a week, four to five hours a day). Plaintiff was paid varying amounts in cash rather than a set wage. According to plaintiff's testimony, he might have received \$75 for three days work, or up to \$800 monthly. He described this position as "kind of like a ... flunky."

Plaintiff's inability to find steady employment was related to his mental retardation and depression. Plaintiff's mental retardation resulted in difficulty concentrating and completing tasks. Plaintiff also suffered from depression and anxiety; in the years leading up to his SSI application, plaintiff was prescribed Vistaril, Elavil, Sinequan, Buspar, Paxil, Tranxene and Triavil to alleviate pain, nervousness, sleeplessness, and anxiety. R. 183-84. In July, 1995, Dr. William Curtis, Ph.D., evaluating plaintiff's condition, found that plaintiff was severely depressed. Although able to perform "simple repetitive tasks," plaintiff was unable to "tolerate day to day work pressures." Dr. Curtis diagnosed plaintiff with "affective disorder," and noted his prognosis was guarded. R. 172-75.

That same month, Dr. Mufson, assessing plaintiff's ability to work at the request of the state, performed an examination. He marked "incapacitated" on the standard form: "profoundly limiting physical or mental condition which permanently precludes any form of employment." He reported that plaintiff suffered from "Major Depression," though he did not substantiate this finding. R. 179.

Dr. Myers, also reviewing plaintiff's file for the state, but without examining him, concluded that Pagan-Afanador was not disabled. He wrote that plaintiff "can communicate, has the ability to remember information and is independent in daily activities." R. 97. He checked off boxes on a list consistent with depression but inconsistent with Dr. Mufson's reported observations regarding plaintiff's reaction to stress. A later evaluation, following an office visit, confirmed Dr. Mufson's earlier diagnosis of "major depressive disorder." R. 186.

Following the administrative hearing, the ALJ requested psychological and consultive examinations. Dr. Joseph Slap performed a physical and mental exam without the benefit of plaintiff's file. R. 268. In July, 1997, Dr. Slap reported that plaintiff was "quite depressed," and had limited mental abilities. Although Dr. Slap acknowledged that plaintiff reacted poorly to stress, he felt that plaintiff's then current treatment at a mental health clinic made him eligible for employment. R.

242-48.

Dr. Christos P. Eleftheros, Ed.D., performed the psychological examination. It is unclear if Dr. Eleftheros possessed plaintiff's medical file. Compare R. 24 (the ALJ's statement that Eleftheros relied on some of plaintiff's medical records) with R. 268 (ALJ's statement that she would assume Eleftheros did not rely on any documentary evidence). On the Weschler Adult Intelligence Scale-Revised (WAIS-R), plaintiff had a 70 verbal IQ, a 71 performance IQ, and a full-scale IQ of 69. Dr. Eleftheros reported that plaintiff had "a great deal of difficulty with very basic comprehension tasks ... his problem solving skills were ... uniformly poor ... he was functionally illiterate." However, Dr. Eleftheros, opining that plaintiff could carry out simple instructions ("but couldn't attend to a task from beginning to end") and would benefit from literacy and job skills training, concluded that plaintiff had little interest in employment. R. 252-57.

III. Discussion

A. Jurisdiction and Standard of Review

This court has jurisdiction over this matter under 42 U.S.C. § 405(g). For matters subject to judicial review under 42 U.S.C. § 405(g), "[t]he findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be

conclusive." Id. Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971); A reviewing court is not empowered "to weigh the evidence or substitute its conclusions for those of the fact-finder." Williams v. Sullivan, 970 F.2d 1178, 1182 (3d Cir. 1992), cert. denied Williams v. Shalala, 507 U.S. 924 (1993). A reviewing court should "scrutinize the entire record and ... reverse or remand if the Secretary's decision is not supported by substantial evidence." Van Horn v. Schweiker, 717 F.2d 871, 874 n.1 (3d Cir. 1983).

B. Five Step Framework

When determining whether an individual is disabled for SSI purposes, the Commissioner engages in a five-step analysis. 20 C.F.R. § 416.920 (1999). First, if the claimant is engaged in substantial gainful activity, a finding of not disabled is mandated. See 20 C.F.R. § 416.920(b). Second, if the claimant does not have a severe impairment, a finding of not disabled is mandated. See § 416.920(c). Third, if the claimant has an impairment that meets the duration requirement³ and is listed in

³"Most of the listed impairments are permanent or expected to result in death, or a specific statement of duration is made. For all others, the evidence must show that the impairment has lasted or is expected to last for a continuous period of at least 12 months." § 404.1525 (a).

Appendix 1 or is equal to a listed impairment, a finding of disabled is mandated. See § 416.920(d). Fourth, if the claimant is not found to be disabled under step three and is not prevented by his disability from performing past relevant work, a finding of not disabled is directed. See § 416.920(e). Fifth, if the claimant cannot perform past relevant work and he cannot, considering his age, education, and past work experience, perform other work, a finding of disabled will be directed. See § 416.920(f). "The claimant bears the burden of proof as to the first four steps, and the [Commissioner] bears the burden of proof as to the last step." Massimino v. Shalala, 927 F. Supp. 139, 143 (S.D.N.Y. 1996); see Bowen v. Yuckert, 482 U.S. 137, 146 n.5 (1987).

1. Step One

The ALJ found that the claimant had not engaged in substantial gainful activity since filing his application for SSI. There is no objection to this conclusion.

2. Step Two

The ALJ found that claimant had "severe mental impairments in the nature of an affective disorder ... and borderline intellectual functioning." These impairments cause "more than a de minimis impact on his ability to work." There is no objection to this conclusion.

3. Step Three

The ALJ found that plaintiff's mental retardation was not a listed disability; plaintiff objects.

Plaintiff must satisfy one of nine such listings in Appendix 1 of the regulations. Two requirements apply to most of the listed mental impairments: (1) claimant possesses particular signs or symptoms (known as "A criteria")⁴; and (2) the symptoms result in a specified degree of functional limitation (known as "B criteria").⁵ However, the listing for mental retardation and autism,⁶ differs from nearly all the others because it does not

⁴The symptoms are found in paragraph A of each listing.

⁵The "functional limitations associated with mental disorders which are incompatible with the ability to work," 20 C.F.R. Part 404, Subpt. P, App. 1 § 12.00, are contained in paragraph B of the listings, and are the same for all relevant disorders. The "B criteria" require, depending on the particular listing, that either two or three of the following restrictions exist in order for disability to be established:

1. Marked restriction of activities of daily living;
or
2. Marked difficulties in maintaining social functioning; or
3. Deficiencies of concentration, persistence or pace resulting in frequent failure to complete tasks in a timely manner (in work settings or elsewhere);
or
4. Repeated episodes of deterioration or decompensation in work or work-like settings which cause the individual to withdraw from that situation or to experience exacerbation of signs and symptoms (which may include deterioration of adaptive behaviors).

20 C.F.R. Part 404, Subpt. P, App. 1 §§ 12.02B, 12.03B, 12.04B, 12.06B, 12.07B, 12.08B.

⁶The listing for mental retardation provides as follows:

require satisfaction of the B criteria in all cases. The listing

Mental Retardation and Autism: Mental retardation refers to a significantly subaverage general intellectual functioning with deficits in adaptive behavior initially manifested during the developmental period (before age 22). (Note: The scores specified below refer to those obtained on the WAIS, and are used only for reference purposes)

The required level of severity for this disorder is met when the requirements in A, B, C, or D are satisfied:

(A) Mental incapacity evidenced by dependence upon others for personal needs (e.g., toileting, eating, dressing, or bathing) and inability to follow directions, such that the use of standardized measures of intellectual functioning is precluded; or

(B) A valid verbal, performance, or full scale IQ of 59 or less; or

(C) A valid verbal, performance, or full scale IQ of 60 to 69 inclusive and a physical or other mental impairment imposing additional and significant work-related limitation of function; or

(D) A valid verbal, performance, or full scale IQ of 60 to 69 inclusive ... with two of the following;

1. Marked restriction of activities of daily living; or

2. Marked difficulties in maintaining social functioning; or

3. Deficiencies of concentration, persistence or pace resulting in frequent failure to complete tasks in a timely manner (in work settings or elsewhere); or

4. Repeated episodes of deterioration or decompensation in work or work-like settings which cause the individual to withdraw from that situation or to experience exacerbation of signs and symptoms (which may include deterioration of adaptive behaviors).

20 C.F.R. Part 404, Subpt. P, App. 1 § 12.05.

allows a finding of disability from mental retardation where the intelligence score falls between 59 and 69 inclusive if either: (1) two B criteria are satisfied; or (2) the claimant experiences some "physical or other mental impairment imposing additional and significant work-related limitation of function."

The ALJ (and therefore the Commissioner) determined that Afanador displayed two A criteria: affective disorder (§ 12.04); and mental retardation (§ 12.05). The ALJ concluded that plaintiff's affective disorder was a depressive disorder rather than a depressive syndrome.⁷ The ALJ characterized plaintiff's mental retardation as "borderline:" his IQ was higher than 60-70 (inclusive).

The ALJ then considered the plaintiff's functional impairment (B criteria). She found that plaintiff was slightly restricted in his daily living,⁸ moderately unable to function socially;⁹ seldom unable to concentrate, persist, or complete

⁷A depressive syndrome is characterized by at least four of the following: (1) anhedonia; (2) appetite disturbance or weight loss; (3) sleep disturbance; (4) psychomotor agitation or retardation; (5) decreased energy; (5) feelings of worthlessness; (5) difficulty concentrating; (6) thoughts of suicide; and/or (7) hallucinations, delusions or paranoid thinking.

⁸The scale runs from slight to moderate to marked to extreme. An individual must demonstrate "marked" inability to be considered functionally impaired.

⁹Id.

tasks;¹⁰ and never subject to exacerbated symptoms at work.¹¹

Based on this analysis, the ALJ found that plaintiff demonstrated none of the B criteria.

Insufficient evidence supported the conclusion that plaintiff's WAIS-scale IQ was 70 or higher. The only IQ testing of record was that performed by Dr. Eleftheros. Plaintiff scored a verbal IQ of 70, a performance IQ of 71, and a full-scale IQ of 69. "In cases where more than one IQ is customarily derived from the test administered, i.e., where verbal, performance, and full-scale IQs are provided as on the WAIS, the lowest of these is used in conjunction with [§] 12.05." 20 C.F.R. Pt. 404, Subpt. P, App.1 § 12.00(D). Plaintiff's lowest measured IQ (his full-scale IQ) was 69. The ALJ did not explicitly reject this score. Cf. R. 253 (Eleftheros' opinion that tests were an "accurate and valid estimate"). There was no credible evidence of record that would have allowed her to do so.¹²

¹⁰Id.; duration and effect of the deficiency should also be considered.

¹¹Id.; duration and effect of the episodes should also be considered.

¹²The Commissioner does not argue that the IQ score was inconsistent with other evidence of the claimant's daily activities and behavior. Cf. Popp v. Heckler, 779 F.2d 1497, 1499 (11th Cir. 1986) (rejecting a claim of section 12.05(C) mental retardation where the claimant's I.Q. score of 69 was inconsistent with evidence that he had a two-year college associate's degree, was enrolled in a third year of college as a history major, and had worked in various technical jobs such as an administrative clerk, statistical clerk, and an algebra

Because Pagan-Afanador's IQ fell between 60 and 69, the ALJ was required to consider if plaintiff suffered an "additional and significant work-related limitation of function." 20 C.F.R. Pt. 404, Subpt. P, App. 1 § 12.05(C). The ALJ's failure to consider this factor would merit a remand, if the ALJ (and therefore the Commissioner) had not conceded that plaintiff suffered a "severe ... affective disorder, whether appropriately diagnosed as depressive disorder or dysthymic disorder ... causing more than a de minimis impact on his ability to work." R. 26.

The ALJ's analysis should have concluded at Step 3 with a finding of a listed disability: mental retardation, coupled with a severe affective disorder. Where, as here, this severe affective disorder made plaintiff unable to work (because of stress and depression) for more than short periods of time, plaintiff was entitled to benefits without inquiry into his past

teacher). Although the ALJ wrote that she "relied on the assessments of the State agency psychologists" who found that "claimant was not significantly limited," she did not find that plaintiff's IQ score was unreliable. Her discussion of plaintiff's mental functioning concerned his "residual functional capacity" to work, not how his impairment related to one listed in the Appendix. The evidence of record compels a finding that plaintiff has suffered mental retardation from birth. Dr. Eleftheros' speculation about plaintiff's ability to "do better" on an IQ test if he applied himself was not supported by the record, and was reached without full knowledge of plaintiff's medical history. The checklists of Drs. Myers and Overcash, stating that plaintiff's residual mental functioning was not significantly limited, were "unaccompanied by thorough written reports, [and their] reliability is suspect." Brewster v. Heckler, 786 F.2d 581, 585 (3d Cir. 1986).

relevant work,¹³ or ability to perform other work under Step 5.

C. Disposition

¹³Even were plaintiff not entitled to disability under Step 3, the ALJ erred in considering plaintiff's activity as a "driver's helper" as past relevant work. This job was an improvised position, created on plaintiff's behalf by his brother.

Under section 416.920(e) of the C.F.R. a claimant will be found to be "not disabled" when it is determined that he or she retains the residual functional capacity to perform:

1. The actual functional demands and job duties of a particular past relevant job; or

2. The functional demands and job duties of the occupation as generally required by employers throughout the national economy.

At claimant's hearing before the ALJ, the vocational expert stated that the claimant could perform the functional demands and duties of his former driver's helper position.

The issue is whether his former driver's helper position is "past relevant work." "Past relevant work" is "work experience [which] . . . was done within the last fifteen years, last[ing] long enough for [the claimant] . . . to learn to do it, and was substantial gainful activity." Rater v. Chater, 73 F.3d 796, 798 (8th Cir. 1996); see 20 C.F.R. § 416.965(a). The plaintiff testified that within the last fifteen years he worked as a driver's helper for about six months, R. 48-49, which is long enough for him to have learned the job. Plaintiff also testified that he made about eight-hundred dollars per month as a driver's helper in 1995. R. 49. However this was "flunky" position, created to makework as a favor to plaintiff's brother. It is no longer available to plaintiff or anyone else, and does not exist in the national economy; it can not be past relevant work. See Kolman v. Sullivan, 925 F.2d 212, 214 (7th Cir. 1991) (a "nonexistent makework training job" that had been created under the auspices of a federal vocational program no longer in operation was not past relevant work). Here, there is no dispute that this "employment" was "makework," arranged by plaintiff's brother. Cf. Pass v. Chater, 65 F.3d 1200, 1206-07 (4th Cir. 1995) (employment that no longer existed in national economy was past relevant work where it was not "makework").

"When there are gaps in the administrative record or the ALJ has applied an improper legal standard," a case should be remanded to the Commissioner for the further development of the evidence. Parker v. Harris, 626 F.2d 225, 235 (2d Cir. 1980). By contrast, "when the record provides persuasive proof of disability and a remand for further evidentiary proceedings would serve no purpose," it is appropriate for a court to reverse and order the payment of benefits. Id.; see also Rosa v. Callahan, 168 F.3d 72, 83 (2d Cir. 1999) ([W]here this Court has had no apparent basis to conclude that a more complete record might support the Commissioner's decision, we have opted simply to remand for a calculation of benefits.").

As "the evidence on the record as a whole is clearly indicative of disability and additional hearings would serve no purpose other than to delay the inevitable receipt of benefits," Johnson v. Callahan, 968 F. Supp. 449, 465 (N.D. Iowa 1997), the Commissioner's decision will be reversed, and this action remanded for the calculation of benefits. 42 U.S.C. § 405(g).

CONCLUSION

After careful consideration of the plaintiff's objections to the R&R, the objections are sustained. The Commissioner's decision is not supported by substantial evidence: the record establishes that plaintiff was subject to a listed disability

(mental retardation) and affected by a "mental impairment imposing additional and significant work-related limitation of function." Plaintiff was disabled per se. The R&R will not be adopted; the decision of the Commissioner will be reversed; this action will be remanded for a calculation of benefits.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANCES PAGAN-AFANADOR	: CIVIL ACTION
d/b/o VICTOR PAGAN-AFANADOR,	:
deceased	:
	:
v.	:
	:
JO ANNE B. BARNHART, COMMISSIONER	:
OF SOCIAL SECURITY	: No. 99-CV-3560

JUDGMENT

AND NOW, this 21st day of May, 2002, upon consideration of the cross-motions for summary judgment, the Report and Recommendation of United States Magistrate Judge Arnold C. Rapoport and plaintiff's objections thereto, plaintiff's supplemental objections, and for the reasons stated in the attached Memorandum, it is hereby **ORDERED** THAT:

1. Plaintiff's objections to the Report and Recommendation (#12 and #13) are **SUSTAINED**. The Report and Recommendation (#11) is **NOT APPROVED OR ADOPTED**.
2. Plaintiff's motion for summary judgment (#7) is **GRANTED**.
3. Defendant's motion for summary judgment (#8) is **DENIED**.
4. Judgment is **ENTERED** in favor of Plaintiff, Frances Pagan-Afanador, and against Defendant, Commissioner of the Social Security Administration.
5. This action is **REMANDED** to the Commissioner of Social Security for the calculation of benefits.

Norma L. Shapiro, S.J.